Tenaga Nasional Bhd v Pengarah Tanah dan Galian Melaka & Anor

HIGH COURT (MELAKA) — APPLICATION FOR JUDICIAL REVIEW NO MA-25–9–09 OF 2019
ANSELM CHARLES J
18 MAY 2021

Civil Procedure — Certiorari — Application for — Decision of Department of Director General of Lands and Mines to impose yearly temporary occupation licence rate towards utility box ('UB') placed by electric utility company on State lands — Passing of amendments to Malacca Land Rules 1996 — UB installed prior to amendments — Whether decision tainted with illegality, irrationality and procedural impropriety — Whether application to quash decision made by Department of Director General of Lands and Mines ought to be allowed

Tenaga Nasional Berhad ('the applicant') sought an order for certiorari to quash the decision of the first respondent, a body responsible for the administration of land matters in Melaka pursuant to s 12 of the National Land Code ('NLC'), as reflected in two letters dated 20 June 2019 and 29 July 2019 ('the impugned decision'). The impugned decision was in respect of the enforcement of the amendment provisions of rr 1(5) and (1)(a)(x), 19(1)(b)(vii) and 19(1)(c)(vii) of the Malacca Land Rules1966 ('MLR') in imposing temporary occupation license ('TOL') charges of RM500 per year for those utility boxes ('UB') currently on state land and/or reserved land ('the subject lands'). The applicant was to apply for the TOL for otherwise the applicant would be committing an offence under s 425 of the NLC. The applicant had more than 1,000 UB in the form of Feeder Pillars and Link Boxes all over the state of Malacca. The applicant contended that, among others, the impugned decision was illegal, against public policy, ultra vires, unconscionable, unreasonable, tainted with procedural impropriety and irrationality in the Wednesbury sense and the decision was made in breach of natural justice. To support its application, the applicant contended, inter alia, that: (a) the respondents were wrong to conclude the applicant a trespasser; (b) UB were placed on the subject lands legally as the UB were installed when the subject lands were still held under private hands and the installations were done upon the invitations of these private owners; and (c) the amendments ought to be applied prospectively and not toward those UB installed prior to it. In resisting the application, the respondents contended, inter alia, that the respondents had the right to amend the MLR 1966 and impose the charges for the TOL. Further the amendments for the imposition of TOL charges were in accordance with the law. Therefore, by adhering to the impugned decision, it would be taken as a form of approval to occupy the subject lands.

Held, allowing application:

(1) Even though there was no express approval by the state authorities for the UB to be on the subject lands, there was ample evidence of the UB being on the subject lands with the implicit or tacit approval of the state authorities. This was especially so where more than one thousand Feeders and Link Boxes had been installed through time without so much as a complaint by the State Authorities. Consequently, the UB could not have been on the subject lands unlawfully. Further there was no complaint or objections as to the placement of these UB before the amendments. The issue of trespass and unlawfulness was only brought up after the amendments to the MLR 1966. It would also follow through that the respondents' decision to impose TOL with a charge of RM500 per year would be unconscionable, tainted with procedural impropriety and irrational as the very basis of its imposition, namely unlawful occupation by the applicant, could not stand as there was implicit approval by the respondents from the time the UB were installed (see paras 51–52).

(2) The Feeder Pillars and Link Boxes were installed in accordance with various Federal Legislations in place to ensure urban infrastructure development conditions were met. The Federal Legislations had accorded rights to the applicant in respect of placing the UB on the subject lands. This by itself negated the respondents' contention that the applicant had trespassed and therefore unlawfully on the subject land. To say that the applicant was unlawfully on the subject lands would be contrary to the spirit in the Federal Legislations necessitating the UB to be on the subject lands in the first place. It is trite also that if there was a conflict between a Federal Law and a State Law, the Federal Law would prevail (see paras 54–55).

(3) Electricity was a necessity and was in the Federal List in Schedule Nine of the Federal Constitution. The imposition of a charge would be to put the applicant in a precarious situation as there was nothing to stop the respondents to increase the TOL charges in the future. This would ultimately burden the public. In this respect the impugned decision was unreasonable on the applicant as it would put the applicant in a worse off position than at present as they would have been legally on the subject land with approval and without any charges. Further, there was no prior discussion between the parties before the amendments were imposed on the applicant. It would be against public policy and unreasonable for the applicants to be burdened with the TOL charge especially where they were not consulted as to its imposition (see paras 53 & 57–58).

(4) The first respondent had stated in no uncertain terms that the applicant must apply for the TOL. It was implicit and understood that an application for TOL could be refused if the applicant refused to pay the charge where there was none before. The effect of such refusal would have

a far-reaching consequence as to the existence of the UB on the subject land. Any charges to be imposed must be reasonable and must be prospective in nature effecting only future installations of UB as otherwise it would be unfair and irrational. In the circumstances, it was sufficient for this court to grant an order of certiorari to quash the decision of the respondents (see paras 59–62).

[Bahasa Malaysia summary

Tenaga Nasional Berhad ('pemohon') memohon perintah certiorari untuk membatalkan keputusan responden pertama, sebuah badan yang bertanggungjawab terhadap pentadbiran hal ehwal tanah di Melaka menurut s 12 Kanun Tanah Negara ('KTN'), berdasarkan dua surat bertarikh 20 Jun 2019 dan 29 Julai 2019 ('keputusan tersebut'). Keputusan tersebut adalah berkenaan dengan penguatkuasaan peruntukan pindaan kk 1(5) dan (1)(a)(x), 19(1)(b)(vii) dan 19(1)(c)(vii) Kaedah-Kaedah Tanah Melaka 1966 ('KKTM') yang mengenakan caj lesen pendudukan sementara ('LPS') sebanyak RM500 setahun bagi kotak utiliti tersebut ('UB') yang kini berada di atas tanah negeri dan/atau tanah rizab ('tanah tersebut'). Pemohon LPS kerana jika tidak, pemohon akan melakukan kesalahan di bawah s 425 KTN. Pemohon mempunyai lebih daripada 1,000 UB dalam bentuk Tiang Feeder dan Kotak Pautan di seluruh negeri Melaka. Pemohon memplidkan bahawa, antara lain, keputusan tersebut adalah menyalahi undang-undang dan dasar awam, ultra vires, tidak bermoral, tidak munasabah, prosedur yang salah dan tidak rasional menurut prinsip kes Wednesbury dan keputusan tersebut dibuat melanggar keadilan semula jadi. Untuk menyokong permohonannya, pemohon berhujah, antara lain bahawa: (a) responden telah salah dalam menyatakan bahawa pemohon penceroboh tanah tersebut; (b) UB diletakkan di atas tanah tersebut secara sah kerana UB telah dipasang apabila tanah tersebut masih dimiliki oleh orang persendirian dan pemasangan dilakukan atas jemputan pemilik persendirian ini; dan (c) pindaan tersebut hendaklah ditafsirkan secara prospektif dan bukan ke atas UB yang dipasang sebelumnya. Dalam membantah permohonan tersebut, responden memplidkan bahawa responden mempunyai hak untuk meminda KKTM 1966 dan mengenakan bayaran untuk LPS. Selanjutnya pindaan untuk pengenaan bayaran LPS adalah menurut undang-undang. Oleh itu, dengan mematuhi keputusan tersebut ianya dianggap sebagai satu bentuk kelulusan untuk menduduki tanah tersebut.

Diputuskan, membenarkan permohonan:

(1) Walaupun tiada kelulusan yang jelas oleh pihak berkuasa negeri untuk UB berada di atas tanah tersebut, terdapat keterangan yang mencukupi bahawa UB berada di tanah tersebut dengan kelulusan tersirat pihak berkuasa negeri. Ini terutamanya di mana lebih daripada seribu Feeder dan Kotak Pautan telah dipasang sepanjang masa tanpa halangan oleh

Pihak Berkuasa Negeri. Akibatnya, UB tidak boleh berada di tanah subjek secara haram. Selanjutnya tiada aduan atau bantahan mengenai penempatan UB ini sebelum pindaan. Isu pencerobohan dan menyalahi undang-undang hanya dibangkitkan selepas pindaan kepada KKTM 1966. Juga, keputusan responden untuk mengenakan bayaran LPS dengan bayaran RM500 setahun adalah tidak bermoral, prosedur yang salah dan tidak rasional sebagai asas permohonan ini tidak dapat dipertahankan kerana terdapat kelulusan tersirat oleh responden semasa UB dipasang (lihat perenggan 51–52).

(2) Tiang Feeder dan Kotak Pautan telah dipasang menurut pelbagai Undang-undang Persekutuan untuk memastikan keadaan pembangunan infrastruktur bandar dipenuhi. Undang-undang Persekutuan telah memberi hak kepada pemohon berkenaan dengan meletakkan UB di atas tanah tersebut. Hal ini dengan sendirinya menafikan tuntutan responden bahawa pemohon telah menceroboh tanah tersebut. Untuk menyatakan bahawa pemohon berada secara tidak sah di atas tanah tersebut bertentangan dengan tujuan Undang-undang Persekutuan yang memerlukan UB berada di atas tanah tersebut. Adalah menjadi undang-undang mantap bahawa sekiranya terdapat konflik antara Undang-undang Persekutuan dan Undang-undang Negeri, Undang-undang Persekutuan terpakai (lihat perenggan 54–55).

(3) Bekalan elektrik adalah satu keperluan dan berada dalam Senarai Persekutuan dalam Jadual Sembilan Perlembagaan Persekutuan. Tuntutan ini menyusahkan pemohonan kerana ianya akan menyebabkan responden tidak berhenti meningkatkan kadar bayaran LPS pada masa akan datang. Hal ini akhirnya akan membebankan orang ramai. Di dalam hal ini keputusan tersebut adalah tidak munasabah kepada pemohon kerana ianya akan meletakkan pemohon dalam kedudukan yang lebih buruk walaupun mereka berada secara sah di atas tanah tersebut dengan kelulusan dan tanpa sebarang bayaran. Selanjutnya, tiada perbincangan terlebih dahulu antara pihak-pihak sebelum pindaan tersebut dikenakan ke atas pemohon. Hal ini bertentangan dengan dasar awam dan tidak munasabah bagi pemohon untuk dibebani dengan bayaran LPS terutamanya apabila pemohonan tidak dirujuk terlebih dahulu (lihat perenggan 53 & 57–58).

(4) Responden pertama telah menyatakan di dalam terma yang tidak pasti bahawa pemohon mesti memohon LPS. Permohonan untuk TOL boleh ditolak sekiranya pemohon enggan membayar bayaran yang tidak wujud sebelumnya. Kesan penolakan sedemikian akan mempunyai akibat besar mengenai kewujudan UB di tanah tersebut. Bayaran yang dikenakan mestilah munasabah dan mestilah bersifat prospektif yang hanya memberi kesan kepada pemasangan UB pada masa hadapan kerana jika tidak, ianya tidak adil dan tidak rasional. Di dalam keadaan ini, adalah

mencukupi bagi mahkamah ini untuk memberikan perintah certiorari untuk membatalkan keputusan responden (lihat paras 59–62).]

Cases referred to

Government State of Penang & Anor v Government of Malaysia & Anor [2014] 7 CLJ 861, FC (refd)
Bank of America, Etc v Chai Yen [1980] 1 MLJ 198; [1979] 1 LNS 7, PC (refd)
Fairise Odyssey (M) Sdn Bhd v Tenaga Nasional Bhd [2019] 6 MLJ 281; [2019] 8 CLJ 20, FC (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Legislation referred to

Electricity Regulations 1994
Electricity Supply Act 1990 ss 12, 24
Federal Constitution art 75, Ninth Schedule, Federal List
Licensing Supply Regulations 1990 reg 13
Local Government Act 1956 s 101
Malacca Land Rules 1966 rr 1, 1(5), (1)(a)(x), 11, 19(1), (1)(a)(x), (1)(b)(vii), (1)(c)(vii)
National Land Code ss 12, 14(g), (1A), 42, 65, 425, 429A
Rules of Court 2012 O 53 rr 2, 3
Street Drainage and Building Act 1974 s 27(1)
Town and Country planning Act 1976 ss 14, 15, 18, 22(2A)(b), 22(2B)(b)
Uniform Building By-Laws 1984

Anselm Charles J:

INTRODUCTION

[1] The Tenaga Nasional Bhd (the applicant) seeks an order for certiorari to quash the decision of the first respondent as reflected in two letters dated 20 June 2019 and 29 July 2019 ('the impugned decision'). This application was made under O 53 r 2 of the Rules of Court 2012 (ROC 2012). Leave under O 53 r 3 of the ROC 2012 had been granted on 17 October 2019.

[2] The impugned decision was in respect of the enforcement of the amendment provisions of rr 1(5) and (1)(a)(x), 19(1)(b)(vii) and 19(1)(c)(vii) Malacca Land Rules 1966 ('MLR') in imposing Temporary Occupation License ('TOL') charges of RM500 per year for those Utility Boxes ('UB') currently on state land and/or reserved land ('the subject lands). The applicant was to apply for the TOL for otherwise they would be committing an offence

under s 425 of the NLC. The applicant has more than 1,000 UB in the form of Feeder Pillars and Link Boxes all over the state of Malacca.

[3] The applicant contended that, among other things, the impugned decision was illegal, against public policy, ultra vires, unconscionable, unreasonable and tainted with procedural impropriety and irrationality in the *Wednesbury* sense. It was also contended by the applicant that the decision was made in breach of natural justice.

BRIEF FACTS

[4] The applicant is the sole electric utility company in Peninsular Malaysia. The applicant is also a licensee under the Electricity Supply Act 1990 ('ESA 1990'). The applicant generates, transmits and distribute electricity throughout Peninsular Malaysia.

[5] The first respondent is responsible for the administration and operations of land matters in the state of Malacca under s 12 of the National Land Code (NLC). The second respondent is the government in charge of the administration in the state of Malacca. The first and second respondents are collectively referred to as the 'respondents' unless otherwise stated.

[6] Sometime in 2018 the second respondent approved the amendments to the MLR allowing for the imposition of the TOL charges on subject lands where the UB were placed. The relevant amendment was to rr 1 and 19(1) of the MLR 1966. The amendments were duly *gazetted* in the Malacca State Government Gazette No MPU 34/2018. The amendments introduced the imposition of a charge of RM500 for the TOL in respect of the UB on the subject lands. The amendments were to come into force on 1 January 2019. According to the respondents there were 5,000 UB in the state of Malacca.

[7] Rule 1(5) of the amended MLR state as follows:

> (5) In these Rules 'utility box' means any electrical enclosure containing any electrical or electronic equipment and facilities and includes any equipment defined in any written law relating to the electricity, supply industry and any facilities defined in any written law relating to relating to the converging communications and multimedia industry.

[8] Rule 19(1)(a)(x) was amended as follows:

> The fees payable in respect of licences for temporary occupation of state land, mining land and reserved land shall be in accordance with the following rates:
>
> *Land for utility box- RM500.00 a year for each utility box*

[9] It is not in dispute that Utility Boxes ('UB') in the context of this application refers of the Feeder Pillars and Link Boxes installed by the applicant. 'UB' and 'Feeder Pillars and Link Boxes' are used interchangeably in this judgment.

THE IMPUGNED DECISION

[10] Consequently, the applicant received a letter dated *20 June 2019* from the first respondent. The letter informed the applicant that the amendments to the MLR 1966 had been passed by the Majlis Mesyuarat Kerajaan Negeri (MMKN). The letter went on to state that a charge of RM500 would be made on UB on the subject lands. The pertinent parts of the letter states as follows:

> 2. Dimaklumkan bahawa Majlis Mesyuarat Kerajaan Negeri (MMKN) telah meluluskan Semakan Semula Malacca Land Rules (MLR) 1968 Tahun 2018 menerusi risalah MMKN.P14 7A/14/2018 yang bersidang pada 3 Oktober 2018. *Untuk makluman, kelulusan ini turut melibatkan pengenaan Caj Kotak Utilid (Utility Box) di bawah Lesen Pendudukan Semerrtara sebanyak RM500/kotak ke atas mana-mana tanah kerajaan dan tanah rizab.*

[11] The letter further stated that pursuant to the decision of the 'Mesyuarat Susulan Berhubung Penyelerasan Kutipan Hasil-Utility Box Negeri Melaka', the applicant was required to complete a TOL application form which came together with the letter. The applicant was to forward the completed form to the first respondent immediately. The pertinent part reads as follows:

> 3. Sehubungan itu, merujuk kepada keputusan Mesyuarat Susulan Berhubung Panyelarasan Pelaksanaan Kutipan Hasil Utility Box Negeri Melaka pada 22 Mel 2019 yang lalu, *bersama-sama ini dilampirkan borang permohonan Lesen Pendudukan Sementara untuk tindakan tuan yang perlu di hantar kepada Pentadbir Tanah Daerah yang berkaitan dengan kadar segera.*

The letter was copied to the State Secretary and the State Financial Officer.

[12] The applicant being dissatisfied with the imposition of the charge replied to the first respondent's letter via a letter dated *17 July 2019*. Basically the applicant disagreed to the imposition of the TOL charges and requested it not be enforced against them. They stated in their reply that the charge imposed would ultimately burden the consumer. The applicant brought to the attention of the first respondent that the imposition of the charge had been referred the to the Ministry of Science, Technology, Environment and Climate Change and the Energy Commission (the said ministry) which regulated their activities and operational cost and was awaiting their feedback.

[13] The first respondent, via a letter dated *29 July 2019*, replied to the

applicant's letter. In refusing the applicant's request the first respondent replied the following:

> PERMOHONAN LESEN PENDUDUKAN SEMENTARA-KOTAK UTILITI
>
> 2. Pentadbiran Ini mengambil maklum perkara-perkara yang dinyatakan di perenggan 3 hingga 7 dalam surat YBhg Datuk bertarikh 17 July 2019 tersebut.
>
> 3. Walau apa pun, pentadbiran Ini Ingin memaklumkan bahawa pengenaan bayaran lesen pendudukan sementara untuk tujuan kotak utility, iaitu sebanyak RM500 bagi setiap kotak, yang diluluskan oleh Pihak Berkuasa Negeri pada 3.10.2018 dan disahkan pada 10.10.2018 telah berkuat kuasa mulai 1.1.2019 sepertimana diwartakan dalam Kaedah-kaedah Tanah Melaka (Pindaan) (No. 2) M. P. U. 34/2018)
>
> 4. Untuk makluman YBhg. Datuk, hanya Pihak Berkuasa Negeri mempunyai kuasa bagi pelupusan bagi tanah Kerajaan, tanah rizab dan tanah lombong sepertimana dinyatakan seksyen 41 Kanun Tanah Negara 1965 (KTN). Antara kuasa pelupusan Pihak Berkuasa Negeri adalah *untuk membenarkan pendudukan tanah Kerajaan, tanah rizab atau tanah lombong di bawah lesen pendudukan sementara.*
>
> 5. *Sebarang pendudukan di atas tanah Kerajaan, tanah rizab atau tanah lombong tanpa kebenaran yang sah adalah merupakan satu kesalahan di bawah* seksyen 425 KTN yang boleh, jika disabitkan, dikenakan denda tidak melebihi RM500,000.00 atau penjara tidak melebihi 5 tahun atau kedua-duanya.
>
> 6. Selain tu, suatu kesalahan di bawah seksyen 425 KTN adalah salu kesalahan yang boleh dikenakan kompaun. Jumlah kompaun yang boleh dikenakan adalah tidak melebihi RM250,000.00 mengikut peruntukan sesyen 429A KTN Sekiranya jumlah kompaun tidak dibayar dalam tempoh masa yang ditetapkan maka pendakwaan bagi kesalahan tersebut boleh dilaksanakan pada pada bila-bila masa.
>
> 7. Sehubungan dengan itu, sepertimana yang dimaklumkan oleh pentadbiran ini melalui surat bertarikh 20 June 2019, pihak YBhg. Datuk dipohon untuk mengambil tindakan dengan mengemukakan permohonan bagi mendapatkan lesen pendudukan sementara untuk tujuan kotak utility dengan segera. *Sekiranya pihak YBhg. Datuk masih gagal dan/atau enggan untuk mengemukakan permohonan lessen pendudukan sementara tersebut, pentadbiran ini boleh mengambil tindakan undang-undang selanjutnya.*

[14] In short, the letter clearly made known to the applicant that the state had authority over state land, reserved land and mining land. Any occupation of these lands without valid approval was an offence under s 425 of the NLC which provides on conviction for a fine not exceeding RM500,000 or to a term of imprisonment not exceeding 5 years of both. An offence under s 425 is also compoundable pursuant to s 429A of the NLC. The compound sum was not to exceed RM250,000. If the compound was not paid within the stipulated time criminal prosecution would ensue. The applicant had to 'apply' for TOL for the subject lands where the utility boxes were placed. Failure to do so would invite further legal action. Section 425 of the NLC reads as follows:

425 Unlawful occupation, etc., of State land, reserved land or mining land

(1) Any person who, without lawful authority —

(a) occupies, or erects any building on, any State land, reserved land or mining land, or

(b) clears, ploughs, digs, encloses or cultivates any such land or part thereof; or

(c) cuts or removes any timber or produce on or from such land, commits an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(1A) Any person who abets the commission of an offence under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Thereafter the applicant informed the first respondent that the matter had been referred to the said ministry and the Energy Commission. According to the applicant the Energy Commission had advised the applicant not to pay the charges pending the outcome of deliberations with the said ministry. The matter was then brought to court by way of judicial review.

The respondents' case

[15] The gist of the respondent's argument was that the respondents had the right to amend the MLR 1966 and impose the charges for the TOL. Further the amendments for the imposition of TOL charges were in accordance with the law. The respondents stressed that the subject land was solely a state matter.

[16] It was also strenuously put forth by the learned state legal advisor that the respondents never gave their approval to the applicant for the UB to be placed on the subject lands. Neither had the applicant ever applied for TOL for their link boxes or feeder pillars or for the reduction of the charges. That being the case the UB were illegally occupying government land. The learned State Legal Advisor asserted that the TOL and the accompanying TOL charge would be a form of approval (*Suatu bentuk kebenaran)* by the respondent for the applicant to occupy the land. By this it would mean that the granting of the TOL would regularize the situation in making the occupation legal albeit in the form of a TOL. Sections 42, 65 and 425 of the NLC and s 12 of the Electricity Supply Act 1990 were referred to. The learned LA also referred to the case of *Fairise Odyssey (M) Sdn Bhd v Tenaga Nasional Bhd* [2019] 6 MLJ 281; [2019] 8 CLJ 20 for the proposition that the approval of the state was needed under s 12 of the Electricity Supply Act 1990 for the UB to be place on the subject lands.

[17] It was also argued that the applicant is a profit motivated company and

should be charged for the land on which the UB were. The fact that the applicant was making substantial profit was evinced from their yearly report. The respondents asserted that since the UB had been placed on the subject lands, there was no charge or payment imposed on the applicant by the respondents.

[18] Further the imposition of the charge was prospective and came into force on 1 January 2019

[19] Finally, it was argued that the respondents were only protecting the interest of the people of Malacca in preventing trespassers on the subject lands.

The applicant's case

[20] The following are some of the issues put forth by learned counsel for the applicant against the impugned decision.

[21] Basically, from the evidence, the applicant explained that the Feeder Pillar consisted of a main busbar, which connects between the incoming and outgoing cable circuit to distribute low voltage power. It connects the source of the electricity to the consumer be it industrial, commercial or residential. Pictures of these Feeder Pillars as can be seen at 'ILD-6' of the affidavit in support. They are situated outdoors on the street. Link Boxes are hardwares to join cables for ease of testing whether the cable is working and/or to find the distance of fault for purposes of trouble shooting in order to avoid blind digging. The functions of the Link Box together with pictures of it can be found at exh 'ILD-7' of the affidavit in support. The importance of the Feeder Pillars and Link Boxes can be seen in the flow chart 'ILD-8'.

[22] Learned counsel for the applicant stressed that the Feeder Pillars and Link Boxes were an integral part of the electricity supply and distribution chain without which there would not be electricity supplied to the consumer.

[23] The applicant argued that the respondents were wrong in predetermining that the applicant was a trespasser on the subject lands. They contend that approval had been given to the applicants by the governing authorities having jurisdiction over the subject lands under the Local Government Act 1956, Town and Country planning Act 1976, Street Drainage and Building Act 1974, Electricity Supply Act 1990, Licensing Supply Regulations 1990 and theElectricity Regulations 1994 at the time the UB were placed

[24] Further on this argument the applicant pointed out that there were more than 1,000 Feeder Pillars and Link Boxes throughout Malacca state.

Exhibit 'ILD-14' shows the widespread distribution of these UB. These UB were installed when the subject lands were privately owned. The UB were installed at the invitation of the owner or developer before the subject lands were reverted to the state government for individual titles to be issued. The applicant therefore contends that the UB were legally on the subject land and the applicant was not a trespasser. Exhibits ILD-10 to ILD-13 were exhibited as examples of the applicant's lawful entry and occupation of the said lands for the purpose of urban infrastructure development.

[25] It was further argued that by concluding that the TOL charges must be enforced against the applicant because they are trespasses would ignore the Uniform Building By-Laws 1984 GN 5178/1984 under which one of the conditions for the Certification of Completion and Compliance (CCC) for any building would be the confirmation of electrical supply from the applicant.

[26] F urther the applicants allege that the first respondent had overstepped and usurped the powers and jurisdiction of the Federal Government in imposing the charge over the UB. In particular reference was made to the Ninth Schedule of the Federal Constitution where the Federal List includes:

> 'Federal works and power'
>
> ...
>
> (c) *Electricity*; gas and gas works; and other works for *the production and distribution of power and energy*.

[27] The removal of the feeder pillars and link boxes in the event of the non-payment of the RM500 charge would potentially interrupt or frustrate the supply of electricity. It must be emphasized here that the applicant was duty bound under s 24 of the Electricity Supply Act 1990 to supply electricity to those who requested for it.

[28] The applicant also contended that the definition of 'Utility Box' was too wide leading to ambiguity as to the installation involved. This led to the impugned decision being procedurally wrong.

[29] The applicant went on to state the applicant was being charged at a disproportionately higher rate than other installations which occupied more space on the subject land than the UB. A comparison with charges imposed on other structures such as bill boards would indicate a lesser sum although the installations were larger. Apart from this no consideration was given to the fact that the UB in the form of the Feeder Pillars and link boxes served a public utility need.

[30] It was also argued that the charge of RM500 was a levy which must be done with the approval of the National Land Council which is a Federal Body. As there was no approval from the National Land Council the respondents were in breach of ss 14(g) and (1A) of the NLC.

[31] Finally, the applicant contends that even if the amendments were applicable, they would only apply to newly built UB and not the ones which had been built and were in existence before the amendments came into force.

The law in respect of judicial review

[32] I find the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, useful in considering the issues raised. There Edgar Joseph Jr FCJ stated:

> In this context, it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (Hi) procedural impropriety. This is how he put it:
>
> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.
>
> To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development'.

[33] As to the limits of Judicial Review Gopal Sri Ram JCA (as he then was) speaking for the Federal Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 stated as follows:

> Of course, there may be cases in which — for reasons of public policy, national interest, public safety or national security — it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the executive, the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule.

[34] Based on the principles stated above, I will now consider the issues raised by the parties.

FINDINGS OF THE COURT

[35] As a preliminary point I remind myself that the applicant is not challenging the amendments to the MLR 1966 per se. The applicant however is dissatisfied that, pursuant to these amendments, the respondents had decided to impose the TOL charges against them in respect of the Feeder Pillars and Link Boxes installed on the subject lands and the dire consequences if the applicant fail to apply for TOL.

[36] It is clear that on reading the letters collectively, the applicant would have been left with no choice but to 'apply' for the TOL for the subject lands and pay RM 500 per year for each UB for otherwise action would be taken against them under s 425 of the NLC or 429A of the NLC. Conversely in the event the respondents, on receiving the applicant's 'application' rejects it, the result would be equally, if not more drastic!

[37] It is also evident that the decision to impose the TOL charge of RM500 was premised and grounded on the respondents' assertion that the applicant had placed the Feeder Pillars and Link Boxes on the subject lands without the approval of the respondents. By doing so the applicant was therefore a trespasser and was unlawfully on the subject land. Section 12 of the Electricity Supply Act 190 was referred to in support of their contention. Section 12 reads as follows:

> *12. Supply lines and other equipment on State land*
>
> *(1) Subject to the approval of the State* Authority and to such conditions as the State

A Authority may deem proper, a licence may extend to authorizing the licensee to lay, place or carry on, under or over State land, such supply lines and to erect and maintain in or upon State land such posts and other equipment as may in the opinion of the Commission be necessary or proper for the purposes of the licensed installation.

B (2) All equipment placed in or upon State land which is not removed therefrom within six months, or such longer period as the State Government may permit, after the expiration or early determination of the licence under the authority whereof the same was so placed, shall vest in and become the property of the Government of the State wherein the same is situated. (Emphasis added.)

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[38] As stated earlier the reason for the introduction of TOL was that there was no approval from the state for the UB to be on the subject land. This is evident from the respondents' affidavit in reply at encl 10 where it was stated:

D 6. Responden-responden menyatakan bahawa pada pertengahan tahun 2018, berdasarkan kajian yang dibuat oleh Responden-responden, telah didapati bahawa terdapat kotak-kotak utiliti yang diletakkan dan dipasang di atas tanah-tanah simpanan jalan yang merupakan tanah Kerajaan atau tanah rizab oleh syarikat-syarikat utiliti *tanpa apa-apa kebenaran atau kelulusan Pihak Berkuasa Negeri. Semakan selanjutnya oleh Responden-responden juga mendapati bahawa tiada sebarang permohonan Lesen Pendudukan Sementara yang telah dipohon oleh syarikat-syarikat utiliti bagi perletakkan dan pemasangan kotak-kotak utiliti tersebut.*

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9. Selanjutnya berdasarkan penyiasatan dan semakan yang dibuat, Responden-responden mendapati antara pemiiik kotak- kotak utiliti di atas simpanan jalan adalah merupakan Pemohon. *Responden-responden juga mendapati bahawa Pemohon tidak pernah memperolehi sebarang kebenaran atau kelulusan daripada Pihak Berkuasa Negeri untuk meletakkan dan memasang kotak-kotak utiliti di atas tanah Kerajaan atau tanah rizab. Apabila Responden- responden melihat terdapat penggunaan tanah Kerajaan dan tanah rizab bagi tujuan kotak utiliti tanpa kelulusan dan kebenaran Pihak Berkuasa Negeri, Responden Pertama di atas arahan Responden Kedua telah menguatkuasakan peruntukkan undang-undang yang telah digubal di dalam Kaedah-Kaedah Tanah Melaka 1960 dengan mengarahkan Pemohon membuat permohonan Lesen Pendudukan Sementara di atas Tanah Kerajaan, tanah rizab atau tanah lombong bagi tujuan kotak utiliti sepertimana peruntukan undang-undang.* (Emphasis added.)

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[39] The TOL charge which was to be imposed would be regarded by the respondents as a form of approval by the respondents for the UB to be on the subject land. This was stated in the following paragraphs in the respondents' affidavit in reply as follows:

I 28. Responden-responden mengakui Perenggan 21 Afidavit Sokongan tersebut setakat bahawa tiada keperluan untuk Pemohon memohon Lesen Pendudukan Sementara bagi pemasangan Feeder Pillar dan Link Box di atas tanah persendirian. Malahan, Responden-responden menyatakan bahawa pemasangan apa-apa kotak utiliti di atas tanah milik persendirian (alienated land) tidak pernah dibangkitkan

oleh Responden- responden. *Responden-responden dinasihati dan menyatakan bahawa Lesen Pendudukan Sementara adalah suatu bentuk kebenaran daripada Pihak Berkuasa Negeri untuk menduduki tanah Kerajaan, tanah rizab atau tanah lombong bagi tempoh satu tahun kalendar dan boleh diperbaharui setiap tahun sepertimana diperuntukkan dalam Kanun Tanah Negara 1965.* ...

41. Responden-responden sesungguhnya menafikan keseluruhan pernyataan Pemohon di Perenggan 36(a) hingga 36(k) seperti berikut:

(j) Responden-responden menyatakan bahawa pengenaan fee berkenaan Lesen Pendudukan Sementara adalah jelas dimaklumkan berkuatkuasa mulai 1.1.2019. Oleh itu, mana-mana permohonan untuk Lesen Pendudukan Sementara bagi tujuan kotak utiliti yang dikemukakan selepas 1.1.2019 akan dikenakan bayaran fee tersebut. *Responden-responden dinasihati dan menyatakan bahawa Lesen Pendudukan Sementara adalah suatu bentuk kebenaran daripada Pihak Berkuasa Negeri untuk menduduki tanah Kerajaan, tanah rizab atau tanah lombong bagi tempoh satu tahun kalendar dan boleh diperbaharui setiap tahun sepertimana diperuntukkan dalam Kanun Tanah Negara 1965.* ... (Emphasis added.)

[40] Thus, it could be reasonably concluded that the respondents' justification for the impugned decision was that the applicant's present occupation of the land was unlawful. The unlawfulness stems from the failure to obtain the approval from the respondents for the UB to be there. The applicant would only obtain approval if it applied and acceded to the payment of the TOL charges. The TOL would terminate unless renewed yearly.

[41] The applicant had shown through examples in exhs 'ILD-1O'V'ILD-11','ILD-12' and 'ILD-13' of the affidavit in support that urban infrastructure development plans would be within the knowledge of the respondents as there were correspondences indicating approval from the 'Jabatan Ketua Menteri Melaka' or local authority concerned. The plans exhibited showed utility installations including in respect of electricity. In such a scenario this court is of the view that that the respondents would have full knowledge of the existence of these UB.

[42] The learned state legal advisor had argued that plans as shown in 'ILD-10 to ILD-13' were with reference to 'pencawang letrik' or transmission lines and not to Feeder Pillars and Link Boxes. Although the plans 'ILD-10' to 'ILD-13' referred to 'Pencawang letrik' or sub-station, the UB in the form of the Feeder Towers and Link Boxes are essential in the distribution of electricity without which the 'pencawang letrik' would not be able to function. This can be seen in the diagram at exh 'ILD-8' of the affidavit in support. I accept the applicant's assertion these UB cannot be seen in isolation and that removal Feeder Towers and Link Boxes would cause blackouts in Malacca. The Feeder Pillars and Link Boxes would serve no purpose without the transmission lines, In *Fairise Odyssey (M) Sdn Bhd* the Federal Court pointed out that:

A the appellant did not deny the fact that the substation would serve no purpose without the transmission lines. The approval for the substation is thus approval for the transmission lines.

B I find the same principle applied in this present case.

[43] There is undisputed evidence that the applicant has more than 1,000 such Feeder Pillars and Link Boxes throughout Malacca state. From the distribution of these UB it is also clear that they are spread out in all the three districts in Malacca namely Melaka Tengah, Alor Gajah and Jasin. There is no question of the respondents not knowing of their existence as the evidence shows that these UB were placed in open areas and by the side of the road visible to all. Quite to the contrary a study had been conducted by the respondents to determine how many UB there were in the state. From the evidence it can also be gathered that the UB had been in place for some time before the amendments to the MLR 1966. Their distribution in all three districts in Malacca as can be see 'ILD-10' to 'ILD-13' of the affidavit in support. Reference is also made to exh 'IDL- 14' which shows the distribution of these UB throughout the state.

E **[44]** Of relevance here is the recent Federal Court case of *Fairise Odyssey (M) Sdn Bhd* the interpretation of s 12 of the Electricity Supply Act 1990 ('the ESA 1990') came about in an action for continuing trespass and damages for trespass. The trespass was said to have been committed by Tenaga Nasional Bhd (TNB) transmission lines which were erected over the claimant's land.

[45] The question of law posed to the Federal Court in that case was whether the approval of the state authority under s 12 of the EA 1990 must be express and not merely implied.

G **[46]** In answering this question, the Federal Court accepted the trite principle that in interpreting a statute, words are to be construed in their plain and ordinary meaning. The words used in s 12 are clear and they mean what they say, that is, that there has to be approval by the State Authority for TNB to H construct the transmission lines on the state land. The word 'approval' is in general use and is well understood.

[47] More importantly the Federal Court observed that the words 'approval in writing' was not present in s 12. Applying the most elementary rule of I construction, the Federal Court held that it is to be assumed that the words and phrases are used in their ordinary meaning. Parliament had deemed it fit not to provide for words 'approval in writing'. The intention of Parliament was made clearer when s 12 is contrasted with other provisions in Electricity Supply Act 1990 which specifically stipulate for certain acts to be done in writing.

[48] The Federal Court went on to state that the duty of the court was limited to interpreting the words used by the Legislature and it has no power to fill the gaps disclosed. To do so would be to usurp the function of the Legislature. It is not for the court to fill the gaps by inserting or adding the words 'in writing' to the words 'approval of the State Authority' in s 12.

[49] The Federal Court went on further to state, and in my view to what is most important to this case, the following:

> [59] Giving the word 'approval' by its plain and ordinary meaning, we hold the view that the approval as envisaged in s 12 *can be in the form of an implied approval or express approval: implied as can be gathered from the facts and circumstances,* or express as in writing. The concern raised by the appellant that as a matter of public policy, it is dangerous for the State Authority to give implied approval or approval by conduct, in our view, does not arise as the court will be required to consider the issue of approval in each case based on its own facts and evidence. (Emphasis added.)

[50] From the facts and circumstances of this case I find that even though there was no express approval by the state authorities for the UB to be on the subject lands there was ample evidence of the UB being on the subject lands with the implicit or tacit approval of the state authorities. This is especially so where more than one thousand Feeders and Link Boxes had been installed through time without so much as a complaint by the State Authorities. Consequently, I find the UB could not have been on the subject lands unlawfully.

[51] I further observe there was no complaint or objections as to the placement of these UB before the amendments. The issue of trespass and unlawfulness was only brought up after the amendments to the MLR 1966. It would also follow through that the respondents' decision to impose TOL with a charge of RM500 per year would be unconscionable, tainted with procedural impropriety and irrational as the very basis of its imposition, namely unlawful occupation by the applicant, cannot stand as there was implicit approval by the respondents from the time the UB were installed.

[52] The irrationality of the decision was further compounded because there was no prior discussion between the parties before the amendments were imposed on the applicant.

[53] Still on the issue of the purported trespass of the applicant I find that based on the evidence adduced the Feeder Pillars and Link Boxes were installed in accordance with various Federal Legislations (hereinafter referred to as 'the said Federal Acts') in place to ensure urban infrastructure development conditions were met. The Federal Acts consists of the following:

A (a) Local Government Act 1956, s 101

(b) Town and Country planning Act 1976 (TCPA 1976), ss 14, 15, 18, 22(2A)(b), 22(2B)(b).

(c) Street Drainage and Building Act 1974 s 27(1) which gives the local
B authority to remove installations, and definition of 'street works'

(d) Electricity Supply Act 1990 s 24 which imposes a statutory duty on the applicant to supply electricity,

(e) Licensing Supply Regulations 1990 reg 13; and the
C

(f) Electricity Regulations 1994 which specifically requires and allows for electricity to be provided as a prerequisite for planning approval. Local plans under the TCPA 1976 would have to have the approval of the State Planning Committee under s 15 of the TCPA 1976.

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[54] I am of the view that these Acts had accorded rights to the applicant in respect of placing the UB on the subject lands. This by itself negates the respondents' contention that the applicant had trespassed and therefore unlawfully on the subject land. To say that the applicant was unlawfully on the
E subject lands would be contrary to the spirit in said Federal Acts necessitating the UB to be on the subject lands in the first place. It is trite also that if there is a conflict between a federal law and a state law the federal law will prevail. See art 75 of the Federal Constitution, see *Government State of Penang & Anor v Government of Malaysia & Anor* [2014] 7 CLJ 861.

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[55] Further and in connection with the issue of unlawfulness, it was also not disputed that the UB were installed on the subject lands at the time these lands belonged to private individuals or developers. The UB were installed in accordance with the development plans. As such there was no necessity to
G obtain the approval of the state authorities at the point of time. The occupation of the UB on the subject lands remained uninterrupted until the impugned decision.

[56] I now come to the issue of whether the impugned decision is
H compatible and consistent with public policy. I determine this issue on the premise that electricity is a necessity and is in the Federal List in Schedule Nine of the Federal Constitution. The respondents seek to permit the occupation of the subject lands under TOL for a yearly charge of RM 500. That is if respondents approves the applicant's application for TOL in the first place. I
I am of the view that the imposition of a charge would be to put the applicant in a precarious situation as there is nothing to stop the respondents to increase the TOL charges in the future. This would ultimately burden the public. In this respect the impugned decision is unreasonable on the applicant as it would put the applicant in a worse off position than at present as they would have been

legally on the subject land with approval and without any charges.

[57] Having considered the nature of TOL and the importance of electricity to the country as a whole, I am of the considered view that it would be against public policy and unreasonable for the applicants to be burdened with the TOL charge especially where they were not consulted as to its imposition. If it were so, the permanence of these installations would be at the mercy of the State Authorities. Not only has the State Authorities the right not to renew the yearly licence without giving any reason, the State Authorities could also increase the yearly charge if they wished to do so. Bearing in mind that the charge is a form of revenue to the state this can be seen as a real danger. Such a situation has the potential of disrupting the electricity supply. As a consequence, it would also have the effect of usurping the powers of the Federal Government in respect of electricity which is exclusively under the Federal List. In deciding as such I had also taken into consideration that Feeder Pillars and Utility Boxes play a vital and essential link in the supply of electricity. Also taken into consideration was the fact that any charge or increase in charge would ultimately be passed to the consumer. It would also erode the powers of the Energy Commission as a Federal body in the determination of the price of electricity.

[58] As noted earlier the first respondent had stated in no uncertain terms that the applicant must apply for the TOL. It is implicit and understood that an application for TOL can be refused if the applicant refused to pay the charge where there was none before. The effect of such refusal too will have far reaching consequences as to the existence of the UB on the subject land.

[59] I further find merit in the applicant's submission that any charges to be imposed must be reasonable and must be prospective in nature effecting only future installations of UB as other wise it would be unfair and irrational. This should be so as they effect the substantive rights of the applicant to be on the subject lands. Rule 11 of the MLR 1966 also requires any matter pending registration or approval under the rules be continued or concluded as though had not amended by the Act. See *Bank of America, Etc v Chai Yen* [1980] 1 MLJ 198; [1979] 1 LNS 7.

[60] It is also my finding that the fact that the status of the applicant as a profit motivated company is not a relevant factor in determining the reasonableness, legality and procedural impropriety of the impugned decision.

CONCLUSION

[61] Although learned counsel for the applicant had raised several other issues in support of this application I am of the view that for the reasons given above, it is sufficient for this court to grant an order of certiorari to quash the

A decision of the respondents. Prayers a, b, c, d and e of encl 1 allowed. I make no order as to cost.

Application for certiorari allowed.

B Reported by K Selvaraju

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